1953 either a renovation or re-erection was effected to the building. On the 22nd February 1965 the landlord served on the tenant a notice terminating the tenancy and seeking vacant possession of the premises.

The defendant's claim was that in 1953 the premises were merely renovated and that the tenancy continued without a break after that. Since the old premises were erected prior to 1948 and consequently protected by the Control of Rent Ordinance, 1956 the new premises continued to enjoy the same protection. After hearing the evidence the learned president came to the conclusion that the building in question was actually re-built in 1953 and had, therefore, lost the protection of the Ordinance. He also came to the conclusion that the tenancy of the old premises had been terminated upon the demolition of the old house.

Against that decision the appellant appealed to the High Court at Kota Bharu and after hearing the argument the late Mr. Justice Hashim dismissed the appeal but due to the untimely death of the late judge he had not given any reasons for doing so. It now falls upon us sitting in the Federal Court to deal with this case by way of re-hearing.

Several grounds of appeal have been urged on behalf of the appellant, of which I consider that it is necessary to deal with only one, and that relates to the question of onus of proof. It is manifest from the pleadings and the record that the learned president was wrongly of the opinion that the burden of proving that the premises were not controlled premises was on the plaintiff. The notes of evidence show that he had called upon the plaintiff to begin. In the case of *Annamalai Chettiar* v. *Yeoh Kee Tin*,[1] Buhagiar J., delivering the judgment of the Court of Appeal, stated that the provisions of the Control of Rent Ordinance did not alter the rule as regards the burden of proof generally. At page 10 he stated:—

> "There is nothing in that section (section 12) affecting the general principles of evidence regarding the burden of proof as laid down particularly in section 103 of the Evidence Ordinance, 1950; under that section the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact is to lie on any particular person."

In this case the tenant (appellant) alleged that the premises were protected for a number of reasons. The burden is, therefore, on him to prove those facts. It is unfortunate that this decision of the Malayan Court of Appeal was not brought to the attention of the president, sessions court. Had it been done I would have no hesitation in saying that the learned president would have called upon the defendant to begin and the confusion arising from the common misapprehension as to the onus of proof would not have arisen in this case.

I would, therefore, allow the appeal and order that the case be remitted to the sessions court for a re-trial. Costs to follow the event.

Barakbah L.P. and **Wan Suleiman J.** concurred.

Appeal allowed.

Solicitors: *S. Seenivasagam & Sons; Wrigglesworth & Co.*

PUBLIC PROSECUTOR v. TAN SIEW LAN

[A.Cr.J. (Raja Azlan Shah J.) June 22, 1966]

[K.L. — Criminal Appeal No. 28 of 1966]

Customs and Excise — Intoxicating liquor — Sufficiency of chemist's certificate — Excise Act, 1961, s. 2.

The accused had been charged with possession of intoxicating liquor. The learned magistrate acquitted her on the ground that the chemist's certificate which was admitted in evidence did not comply with the requirements of the definition of "intoxicating liquor" under section 2 of the Excise Act. The chemist had stated *inter alia* "I analysed the contents of the above-mentioned exhibits and found them to be 'intoxicating liquor' as defined in section 2 of the Excise Act, 1961." The public prosecutor appealed against the acquittal.

Held: although it is highly desirable that the chemist in his report should follow the wording of the section, failure to do so is not fatal to the prosecution case; so long as there is sufficient indication that the chemist had directed his mind to the requirements of the section, omission to state anything like detail will not be fatal.

Cases referred to:—

(1) *Deputy Public Prosecutor* v. *Tan Ah Guat* [1947] M.L.J. 32.

(2) *Toh Kim Soo* v. *R.* [1954] M.L.J. 325.

CRIMINAL APPEAL.

Nik Saghir bin Mohamed Noor (Deputy Public Prosecutor) for the Public Prosecutor.

Kirpal Singh Brar for the respondent.

Raja Azlan Shah J. (delivering oral judgment): This appeal revolves on the issue whether the chemist's certificate is conclusive evidence that the substance as examined by the chemist is intoxicating liquor as defined in section 2 of the Excise Act, 1961. The accused was charged with possession of intoxicating liquor, to wit, 5 jars and 2 bottles containing 24½ gallons, under the provisions of section 73(1)(a) and punishable under section 73(1) of the said Act. She claimed trial and at the end of the prosecution case the learned magistrate acquitted the accused, basing his decision on the ground that the chemist's certificate which was admitted did not comply with the requirements of the definition of intoxicating liquor under section 2 of the Act.

Section 2 of the Excise Act, 1961, states:

"Intoxicating liquor means any liquor of any description containing more than 2 per centum of proof spirit which is fit or intended to be or can by any means be converted for use as a beverage but does not include toddy".

The section contains two essential elements, namely, the liquor must contain more than 2 per cent. of proof spirit, and secondly it must be fit or intended to be or can by any means be converted for use as a beverage but does not include toddy. The learned magistrate was of the opinion that the chemist's report had established the first element but not the second. He relied on the Singapore case of *Deputy Public Prosecutor* v. *Tan Ah Guat.*[1] The case was shortly reported. In that case the court held that the second element of that particular section (in *pari materia* with our section) had not been established, and observed that it was highly desirable, even though not strictly necessary, that the wording of the section should be followed. That is all we know about that case. The contents of the chemist's report were not reproduced in the judgment and therefore it is not possible to judge what it contained, and in that respect that case can be distinguished from the present case. In the present case the chemist stated *inter alia,* and I quote:

"I analysed the contents of the above-mentioned exhibits and found them to be 'intoxicating liquor' as defined in section 2 of the Excise Act, 1961".

She then went on to state the analytical data as she found them. Counsel for the respondent submitted that when the chemist had included the analytical data in her certificate she was not aware that section 2 of the Act requires both the elements to be proved. I cannot accept that proposition. A passage in the chemist's report, to wit, that she found the contents of the exhibits to be intoxicating liquor as defined in section 2 of the Act is sufficient to say that she had directed her mind to the requisites of the provisions of the section. Again, counsel for the respondent said that although the certificate is admissible it is not conclusive evidence that what the certificate purports to show is that the substance is intoxicating liquor. On the other hand, the learned deputy public prosecutor has directed my mind to the case of *Toh Kim Soo* v. *Regina.*[2] In that case the prosecution had to prove *inter alia* that the substance contained a certain percentage of pure alcohol by weight. However, the chemist's certificate did not say how much pure alcohol by weight there was in the contents but merely the percentage of proof spirit. The appellate judge in that case was of the opinion that the certificate was sufficient although it would have been more satisfactory if it had followed the wording of the section. The learned deputy public prosecutor has asked me to apply the observations of that case to the present case.

I observe that a principle to be gleaned from the two cases is that although it is highly desirable to follow the wording of the section in the certificate, failure to do so is not fatal to the prosecution case. In my view, as long as there is sufficient indication in the chemist's report to show that the chemist had directed her mind to the requisites of the section, omission to state anything like detail will not be a criterion; her expression of opinion that the substance is intoxicating liquor within the meaning of section 2 must be a rational one and drawn from adequate data. In the present case the chemist has given the analytical data as required under the first element of the section, but she did not in so many words indicate in her certificate the second element as required under the section. However, she has directed her mind to the requisites of the section and is of the opinion that the substance was intoxicating liquor within the meaning of that section. To my mind that is sufficient although it would have been more desirable if she had in so many words followed the exact wording of the second limb of section 2.

In the circumstances I am satisfied that the prosecution had proved a *prima facie* case. I will therefore allow the appeal and order the learned magistrate to call for the defence.

Appeal allowed.

Solicitors: *B. Kaher Singh & Co.*

YONG MOK HIN v. UNITED MALAY STATES SUGAR INDUSTRIES LTD.

[O.C.J. (Raja Azlan Shah J.) June 22, 1966]

[K.L. — Civil Suit No. 1319 of 1964]

Contract — Building contract — Payment by instalments — Whether contract an entire contract — Non-completion of work — Non-payment of instalment — Breach of contract — Measure of damages — Equitable set-off.

The plaintiff, a building contractor, claimed various sums in respect of a progress payment on a building contract and building materials supplied. The defendant company in their defence pleaded that the work was done under a contract, that the work was not completed on the agreed date and that the plaintiff had abandoned the work and they therefore counterclaimed for damages for breach of contract.

Held: (1) the contract in this case was not an entire contract and the plaintiff was therefore entitled to payment for work completed by him;

(2) the plaintiff was not entitled to treat the contract as repudiated for mere non-payment of the instalment and that in the circumstances, the plaintiff had repudiated the contract by abandoning it;

(3) as the defendant company had opted to accept repudiation and sue for damages for incomplete and defective work the measure of damages would be the difference between the reasonable costs of completing the works